In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1944

No. 917 91

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,

Petitioner,

vs.

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Jack E. Ellis respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Ap-

peals for the Ninth Circuit. The Circuit Court of Appeals (Healy and Mathews, CJJ; Garrecht, CJ, dissenting) rendered its decision March 1, 1945 (R. 675) and denied a rehearing April 4, 1945. (R. 677.) The judgment (not yet reported) reversed a judgment of the District Court for the Northern District of California, Southern Division (Goodman, DJ) for the recovery in an action in detinue, of petitioner's (plaintiff's) goods, or in the alternative for the value thereof, and for damages for the unlawful detention by the De La Rama Steamship Co., Inc., a corporation, of said goods withheld by said steamship company under a claimed lien for alleged freight charges. Original and amended memorandum opinions of the District Court appear at R. 594 and 596, its findings of fact and conclusions of law at R. 596-608.

The case comes up from the law side of the Court, having been removed from the Superior Court of the State of California on grounds of diversity of citizenship. (R. 22; see R. 12, respondent's petition for removal, stating that the case is one at common law.) The record on appeal was filed in the Circuit Court of Appeals. The majority opinion of that Court appears at R. 664-74, the dissenting opinion of Judge Garrecht at R. 674-5. The United States Supreme Court has jurisdiction under 28 USCA 347(a).

SUMMARY STATEMENT OF MATTER INVOLVED.

The parties will hereafter be referred to by their trial Court denominations of plaintiff and defendant.

Plaintiff Jack E. Ellis, a resident of San Francisco, California, is an exporter and importer, doing business as General Export Company, exporting and importing to and from the Philippine Islands, Hong Kong, China, Straits Settlements and Java, prior to the attack on Pearl Harbor and the war with Japan. Defendant The De La Rama Steamship Co., Inc., is a Philippine corporation, a common carrier by water, carrying between ports of the United States and ports of the Far East, including the Philippine Islands. In the latter part of *November 1941* plaintiff had a cargo of common glassware originating in Indiana, to be shipped via New York to Manila and Cebu, Philippine Islands, and Hong Kong. The glassware remained in the possession of plaintiff's agent, the Erie Railroad, aboard lighters, until *12:45 P.M., Eastern War Time, Sunday, December 7, 1941,* when the defendant steamship company issued docks receipts therefor to the lightermen, each of which provided, among other matters, as follows:

> "Neither the company nor the vessel on which the goods are subsequently loaded shall become responsible for the goods as carrier until actually loaded."

and removed said glassware to its docking facility, Pier 2, Erie Basin, Brooklyn, N. Y. The glassware was to be carried under bills of lading not executed and issued by the steamship company until *December 11, 1941,* which contained prepaid freight clauses providing that freight should be earned "on shipment of the goods and is to be retained by carrier, cargo lost or not lost, or if there be a forced interruption or

abandonment of voyage at a port of distress or elsewhere."

On *December 7, 1941,* defendant's vessel M/S Dona Aniceta was being loaded at New York. Plaintiff's cargo was on the dock. The defendant's New York Port Captain, in charge of the loading of said vessel and of the defendant's affairs at said docking and shipping facility received the news of the Japanese attack on Pearl Harbor, but continued loading as if nothing had happened. The District Judge found that *all* of plaintiff's cargo was loaded *after* knowledge of the Pearl Harbor attack. (Finding VII, R. 604.) Clearance of the vessel was refused on the morning of December 8, 1941, and the vessel was ultimately requisitioned on December 31. She never sailed on behalf of defendant. The defendant claimed full freight from New York to the ultimate Far Eastern destinations of plaintiff's glassware, under the foregoing prepaid freight clause. When this was not forthcoming it withheld, despite plaintiff's demand, and still withholds, his goods for a claimed freight lien. Plaintiff sued for the return of his glassware, or its value if the return of the specific personal property could not be had and for damages for its alleged unlawful detention.

The District Judge found as a fact that defendant was not justified in proceeding to load plaintiff's goods (without consulting plaintiff, who was in San Francisco) after knowledge of events at Pearl Harbor. (Finding VI, R. 602-3.) The District Judge accordingly held that defendant could not claim the

freight asserted; that plaintiff was not indebted to the defendant therefor, and that the defendant had no freight lien. Judgment went for the plaintiff for the return of his glassware or in the alternative for its value if such recovery could not be had and for damages for defendant's unlawful detention thereof. The Circuit Court of Appeals reversed by a 2-1 decision. It held that the situation had to be judged as of the time that the carrier had to make its decision and that *as a matter of law* there was no basis for holding that the carrier should have known that it would be exposed to a greater risk or might not be able to sail. (Another possible interpretation of the majority opinion—that the Circuit Court of Appeals attempts to *reweigh the facts*—is also discussed hereinafter.)

REASONS RELIED ON FOR ISSUANCE OF WRIT.

A writ of certiorari should issue for the following reasons:

1. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. The majority opinion cites and relies on *The Styria,* 186 U. S. 1, but in effect decides contrary to it; likewise contrary to the *Kronprinzessin Cecilie,* 244 U. S. 12.

2. Alternatively, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. *The Styria* and *Kronprinzessin Cecilie* (and all authorities cited by the majority of the Circuit Court of Appeals)

were cases where the carrier *refused* to carry into a war zone. In the present case the carrier says it *planned to carry.* The precise question in the earlier cases was under what conditions the carrier had a *right* to refuse to sail. The precise question in the present case is, under what conditions may a carrier be held to have *a duty not to sail,* or at least to consult its shippers before moving their cargo. If this difference is thought to distinguish the earlier holdings, the instant case presents an important federal question, not yet decided.

3. If the Circuit Court's opinion be construed as *reweighing the facts,* then its decision is in conflict with the applicable decisions of this Court, or alternatively, of other circuits. Heretofore it has been the accepted rule that *in a law appeal,* if more than one inference is reasonably deducible from undisputed facts, the question of which inference to draw, itself, presents an issue of fact on which the holding of the trial judge is final.

BRIEF.

A supporting brief is attached to this petition.

PRAYER.

Wherefore, your petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the Circuit Court of Appeals commanding said Court to certify and send to this Court on a day

certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said court "No. 10,701, The De La Rama Steamship Co., Inc., a corporation vs. Jack E. Ellis, an individual doing business under the fictitious firm name and style of General Export Company", to the end that said cause may be reviewed and determined by this Court as provided by law, and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court and that the judgment of the District Court may be affirmed.

Dated, San Francisco, California,
May 25, 1945.

GEORGE OLSHAUSEN,
Attorney for Petitioner.

ABRAHAM SETZER,
Of Counsel.

CERTIFICATE OF COUNSEL.

George Olshausen, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

GEORGE OLSHAUSEN.

Subscribed and sworn to before me this 25th day of May, 1945.

(Seal) THOMAS A. DAUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.